THE LEGAL DIFFICULTIES GENERATED BY THE ALTERATION OF THE PROVISIONS REGARDING THE HEARING OF WITNESSES BY THE COURT WITHIN THE CIVIL PROCEDURAL CODE

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Abstract

Since Law no. 310/2018 has altered the legal provisions of the Civil procedural code regarding the way in which witness testimony is to be obtained, a certain number of difficulties have been generated due to the fact that the actual hearing of witnesses has to occur in a radically different manner, thus imposing on the court some obligations which may prove troublesome in the future. The paper aims to establish some proper practices, in terms of ensuring for all parties a fair trial whilst also abiding by the new legal solutions.

Keywords: *Civil procedural code Problems Witness Testimony Hearing Proper Conduct of the Court*

1. Introduction

1.1. What matter does the paper cover?

The article shall endeavour to establish a preliminary point of view regarding the effects of Law no. 310 which was adopted in 2018 on the plaintiff, the defendant but also on what it implies for the judge should it apply the new provisions to the letter.

It shall also attempt to identify potential solutions needed to avoid legal difficulties generated by the new alterations to the Civil procedural code, including interpreting the text in accordance with the other relevant legal provisions, analysing the opportunity of a *de lege ferenda* effort and ultimately the necessity of implicating the Constitutional Court of Romania into the matter at hand.

1.2. Why is the studied matter important?

The study matter is paramount because there are a great deal of cases in which witnesses are heard by the court. It should always ensure that witness testimony is obtained in a legal mannor and in accordance to both the national legal provisions but also the European Court of Human Rights case law. The impact of witness testimony on the outcome of trials cannot be refuted and hence the necessity of identifying a workable legal method of administering the evidence, in circumventing potential problems which may arise.

1.3. How does the author intend to answer to this matter?

It is hoped to reach the objective of offering a very detailed outlook on the effects of the alteration via the analysis of the legal texts which are applicable, the point of view of both the legal authors which have analysed the effects of the new alterations but also that of prominent legal authors who have offered a clear perspective on the institution in general prior to the new law. By analysing the consequences of the altered legal text in-depth, it is hoped to achieve some results in offering the reader a viable option in terms of applying the specific legal provisions.

1.4. What is the relation between the paper and the already existent specialized literature?

The specialised literature has addressed the institution of witness testimony in general and there are also some legal authors who have attempted to shed some light on the new modifications. The paper shall attempt to utilise their insight and further advance the topic in gaining a perspective as detailed as possible of what it means for future trials for the judge to enforece the will of the legislator.

2. The legal applicable texts

Firstly, our national Civil procedural code[1] outlined in Article no. 321 the initial legal framework regarding the method in which the hearing of witnesses took place: " *Each witness will be listened separately, and without the presence of those who are have been yet heard.*

(2) The order of hearing witnesses shall be fixed by the President, taking into account the request of the parties.

(3) The witness shall first answer the questions of the chairman and then the questions asked, with his consent, by the proposing party as well as by the opposing party.

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[1] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

(4) After the hearing, the witness shall remain in the sitting room until the end of the investigation, except if the court decides otherwise.

(5) At the hearing, the witness shall be allowed to freely express his testimony, without being allowed to read a previous written answer; but he can employ the use of notes, with the President's approval, but only to specify figures or names…".

The procedure was also regulated in Article no. 322 and 323 of the Civil procedural code[2]: " *Witnesses can be asked again if the court finds fit.*

(2) Witnesses whose statements do not fit can be confronted.

(3) If the court finds that the question raised by the party can not lead to solving the case, is offensive or tends to prove a fact whose proving is forbidden by the law, it will dismiss it. The court will, ***at the request of the party****, shall write down both the question and the reason why it was not approved.*

Art. 323. - (1) The testimony shall be written by the clerk, after the dictation of the president or the delegated judge, and shall be signed on each page and at the end of it by the judge, the clerk and the witness, after he has become aware of the contents. If the witness refuses or can not sign, it will be mentioned at the end of the minute.

(2) Any additions, deletions or changes in the testimony must be approved and signed by the judge, the clerk and the witness, under the sanction of not being taken into account.

(3) Unfilled places in the statement must be barred with lines so that no additions can be made.

(4) The provisions of art. 231 par. (2) shall apply accordingly. "

However, with the advent of Law[3] no. 310 passed in 2018, certain alterations have been made to these legal texts: " *(1) Each witness will be listened separately, and without the presence of those who are have been yet heard.*

(2) The order of hearing witnesses shall be fixed by the President, taking into account the request of the parties.

(3) The witness shall first answer the questions of the chairman and then the questions asked, with his consent, by the proposing party as well as by the opposing party.

(4) After the hearing, the witness shall remain in the sitting room until the end of the investigation, except if the court decides otherwise.

(5) At the hearing, the witness shall be allowed to freely express his testimony, without being allowed to read a previous written answer; but he can employ the use of notes, with the President's approval, but only to specify figures or names.

(6) If the court finds that the question raised by the party can not lead to solving the case, is offensive or tends to prove a fact whose proving is forbidden by the law, it will dismiss it. ***In this situation, the court will write down the name of the party and the question asked and the reason why it was not approved.***

(7) If the question is approved, the question, together with the name of the party who formulated it, followed by the witness's response, shall be literally recorded in the witness statement according to the provisions of Art. 323 par. (1).

Art. 322. - (1) Witnesses may again be asked, if the court finds fit.

(2) Witnesses whose statements do not fit can be confronted.

(3) 'repealed'

Art. 323. - (1) The testimony shall be written by the clerk, ***who shall record the witness's statement in a exact and literal manner****, and shall be signed on each page and at the end of it by the judge, the clerk and the witness, after he has learned of the contents . If the witness refuses or can not sign, it shall be mentioned at the end of the statement.*

(2) Any additions, deletions or changes in the testimony must be approved and signed by the judge, the clerk and the witness, under the sanction of not being taken into account.

(3) Unfilled places in the statement must be barred with lines so that no additions can be made.

(4) The provisions of art. 231 par. (2) shall apply accordingly. "

Also, very relevant to the issue at hand are the findings of the Constitutional Court of Romania[4] in terms of the similar obligation to write down the exact testimony of the defendant during a criminal trial:" *465. In analyzing the criticized legal text, the Court notes that it provides the obligation to* ***literally record the suspect or defendant's statements by the judicial body or by the court****. According to the Explanatory Dictionary of the Romanian language, "exactly" has the meaning "exactly the same", and "literally" has the meaning "that is done, is reproduced word by word, letter by letter; textual, exact". Therefore, the statement must be worded word for word reproduces exactly what the suspect or defendant conveys.*

466. However, under the procedural provisions mentioned above there are sufficient safeguards to properly record the suspect's or the defendant's statements, and Article 110 (2) of the Code of Criminal Procedure provides that if he should agree with the content of the written statement, the suspect or defendant shall sign it, and if there are any additions, corrections or explanations to be made, they can be indicated in the end of the statement, followed by the

[2] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

[3] Law no. 310/2018 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts published in the Official Gazette of Romania no. 1174 of November 25, 2008

[4] DECISION no.633 of 12 October 2018 on the objection of unconstitutionality of the provisions of the Law for amending and completing the Law no. 135/2010 on the Criminal Procedure Code, as well as for amending and completing the Law no.304 / 2004 on the judicial organization

signature of the suspect or the defendant. The newly introduced obligation appears not only as excessive and burdensome for the authorities but it is likely to create difficulties in the enforcement work, with consequence of delaying or blocking the act of justice.

467. The Court therefore considers that the criminal procedural provisions in force contain sufficient safeguards to respect the rights of the defense suspect or defendant, so that the provisions of art. I, item 55, related to paragraph (1) of the Code of Criminal Procedure, are unconstitutional with respect to the phrase "exactly and literally", which is likely to prejudice the parties right to a fair trial, within a reasonable time. "

3. The opinion of the legal authors

Bozeșan was among the first to notice that it is the obligation of the court to request to the clerk to write down the question of the party *ex oficii* and not only when it is formally solicited by one of the parties.[5]

He has also commented regarding another key difference, in terms that it is the obligation of the court to literally write down witness testimony but without being able to raise any criticisms regarding this change.[6]

In terms of in which cases is the judge obligated to proceed according to the new guidelines, it has been noted that in relation to article 26 paragraph 2 of the Civil procedure code the administration of evidence is to be conducted in accordance to the law at that particular moment in time. [7]

A collective of prominent authors have put together a study regarding the modifications to the Civil procedural code[8] stating that that the new alterations are applicable even to cases iniated prior to the entry into force of the law when it comes to the procedure regarding witness testimony.

They have also delved into the necessity of using technical support in order to further ensure that the procedure is followed as smoothly as possible: " *In any case, we believe that it would be appropriate either for witness testimony to be recorded audio-video and technical storage support would constitute the means of proof, which would alleviate some inconveniences of the re-examination of testimony by the superior court, respectively whether the judge sums up the witness's statement as a precedent or gives it a more concise and intelligible form, as the parties and the witness himself can of course challenge, as before, the concrete way of dictating and recording the witness's statement.* "[9].

Traditionaly, other important legal authors[10] have refrained from expressing any views regarding the necessity for the solution to be implemented by the legislative authorities.

The most prominent author[11] in the field has offered a most useful definition of the testimony: " The testimony, could be defined as the oral statement made by a natural person, before the court, regarding **to a precise and pertinent fact he is personally aware of**. ".

4. The interpretation of the author

Firstly, the analysis should begin with the actual definition of the testimony provided by the most prominent author in the field who has clearly and explicitly stated that is deals with precise and pertinent facts that the witness has come into contact.

Despite the fact that the definition has been provided by the author prior to the alterations made to these legal texts it is still very much applicable even to the new situation.

This one first important issue, which can be derived from the opinion of the legal authors in full accordance to the legal text, is the fact **that the court is called upon to decide what specific issues in the witness speech can be integrated** in the *stricto sensu* notion of testimony.

Indeed, the parties should be allowed to express their views regarding the opportunity to write down certain facts which could prove more relevant further on in the trial.

However, the judge is the soul actor in this particular play which is allowed to decide how much of what the witness speaks about can be actually integrated in the witness testimony.

This is paramount, and is one of the reasons why the article deals with this aspect first.

There can be no doubt that the judge should be allowed to censor or limit what the witness actually speaks about, in terms of limiting the number of words in the witness testimony so as to ensure a proper

[5] Bozeșan, V. (2019), „ *Codul de procedură civilă actualizat la 10 ianuarie 2019*", ed. Solomon, București, p. 108
[6] Bozeșan, V. (2019), „ *Codul de procedură civilă actualizat la 10 ianuarie 2019*", ed. Solomon, București, p. 108
[7] Bozeșan, V. (2019), „ *Codul de procedură civilă actualizat la 10 ianuarie 2019*", ed. Solomon, București, p. 109
[8] *Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP,,, Comentarii asupra modificării noului Cod de procedură civilă prin Legea nr. 310/2018. Între dorința de funcționalitate și tendința de restaurație", last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3*
[9] *Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP,,, Comentarii asupra modificării noului Cod de procedură civilă prin Legea nr. 310/2018. Între dorința de funcționalitate și tendința de restaurație", last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3*
[10] *Răducanu, G., Dinu, M., „ Fișe de Procedură Civilă ", Ed. Hamangiu, București, 2016, p.208*
[11] Boroi, G. (ed.), (2013), „Noul Cod de Procedură Civilă Comentat, vol.2 " [The Commented New Civil Procedural Code, vol. 2], București: Ed. Hamangiu, p. 639.

continuity and a trial which lasts a reasonable amount of time.

Failure to do so can and would actually result in chaos in the courtroom, since most often than not witnesses do not know what the judge is actually interested in.

For example, the witness may choose to express his views regarding the relationship between the plaintiff and the defendant in general whereas the judge **may be interested in details regarding a specific period**.

It should come as no surprise for the reader that the judge is still entitled to this right, namely to decide which aspects of the witness statement can actually be referred to as witness testimony.

In terms of the obligation for the court to write down all the questions addressed to the witness by each party in particular, it's application is very clear but it's consequences are more than open to discussion.

This is when the opinion of the Constitutional Court of Romania becomes extremely relevant. When it was asked to provide insight into whether or not the obligation to literally write down the accused' statement word for word was in fact unconstitutional.

There is no reason why this line of thinking is not applicable also for the civil trial.

The right of the parties for both a fair but also swift trial as stated in article 6 of the Civil procedure code is clearly infringed upon with the advent of this new alteration.

One mal-intended party may choose to create chaos in the courtroom by addressing a great number of questions to the witness so as to obligate the judge to make the clerk write down each and every one of them.

Should the judge refrain from doing so would result in a direct breach of a clearly formulated legal provision.

However, should the judge apply that legal provision as formaly as possible would also result in an infringement of the rights provided by article 6 of the parties to enjoy a trial in a period as short as possible.

It is a significant issue, able to generate far more legal difficulties than it would have solved.

One possible solution would be to alter it in terms of a *de lege ferenda* effort on the part of the legislative authority.

Should it not occur in a reasonable amount of time, another, more direct approach would be to address the Constitutional Court of Romania.

Given the fact that during the criminal trial this was viewed as a problem and the provisions were blatantly considered as unconstitutional a similar solution for the civil trial would seem appropriate.

The problematic provisions are also applicable in cases which have been initiated prior to entry into force of Law no. 310 adopted in 2018, since the administration of evidence is to be conducted in accordance to the legal provisions at that actual moment.

A scenario can be conceived in which should the plaintiff have known about the problem created by the alteration, he would not have resorted to addressing the court with that particular claim and might have sought to resolve the legal conflict in another way, such as adressnig a mediator.

However, since the solution is legally binding, the party is obligated to suffer consequences that he may not have accepted or even known prior to addressing the court.

It is thus also a question of a lack of predictability for the law and one could argue that it could be viewed as an infringement into the right to a fair trial.

Indeed, the court is entitled to apply a fine, as a sanction for the party who chooses to exercise it's legal rights without *bona fide* but this has no bearing on its obligation to make sure that every word spoken by the witness is to be jotted down on a piece of paper.

Also, the necessity for such a alteration is not stringent, given the fact that the whole proceedings are audio recorded. Should any omission committed by the court occur, which may affect on outcome of the trail, it can be easily by simply analysing the audio material later on, during the appeal.

The parties are free to request a copy of the audio file. They are also able to appeal the solution of the first instance court. They need only indicate a specific issue which the witness has pointed out but which the court omitted to analyse in passing it's judgement.

The system initiated after the adoption of the Civil procedure code worked.

New alterations, without a proper analysis, provided is extremely detrimental for all the participants in the trial.

Moving on to the opinion of the legal author in terms of employing technical support so as to make sure that the trial takes place smoothly, can be viewed as a very welcomed idea.

It should be implemented as fast as possible in terms of purchasing for all the courts in Romania dictation software so as to make it easy to abide by the new provisions, should they remain unchanged.

The provisions also make it more difficult for the court to address its control questions to the witness, since everything has to be written down.

Thus, the lawyer of one of the parties, in future cases will have direct access to the method in which the judge verifies the credibility of the witness. He can anticipate what those control questions would be and he can use the information in future trial so as prepare the witness for addressing them in the hopes of validating his credibility, despite it lacking.

Overall, these provisions are detrimental in this respect and in the long term may affect the right of the parties to a fair trial in the future since a most important tool of the judge, namely the process of verifying the credibility of testimonies may be hindered severely.

This is not in the best interests of any of the parties and can lead to very problematic situations in which the witness who is not expressing the truth has

been prepared prior to his testimony to answer those specific control questions which are to be addressed by the diligent judge.

Thus, it would be far easier for the witness to pass this most important checkpoint during the trial and later to provide false testimony, which would greatly disadvantage the opposing part.

Consequently, the legislator, without knowledge, may have hindered these very necessary efforts left in the care of the judge and may have severely damaged the right to a fair trial for future parties who will be at the mercy of false testimonies and malevolant lawyers.

Thus, it becomes very clear that the actions previously mentioned must be taken by both the judge and the other diligent participants in the trial in addressing this issue, which has the potential to create very problematic outcomes that are not in the interests of anyone.

It is normal for the plaintiff to initiate the trial but also for the defendant to participate in it, knowing that the judge has an arsenal of methods at its disposal intended to verify the authenticity of the witness testimony.

5. Conclusions

5.1. Summary of the main outcomes

As the analysis is about to be concluded, it is evident that some of the alterations are unuseful and should be rectified as soon as possible, either by means of a new modifying law or with the intervention of the Constitutional Court of Romania.

For the moment the effects of the modifications are somewhat limited but as time passes by it will become more evident that in the long term its effects are ill.

Now is the time to act to address the issue at hand and minimise the effects as much as possible in order to protect the rights of the party who sooner or later may suffer an infringement.

5.2. The expected impact of the research outcomes

It is hoped that the reader of the article shall endeavour on his own to analyse the effects of the alterations and reach his or her own conclusions regarding the issue at hand.

Should he find the conclusions offered in the paper as valid, it is expected that he joins the effort of addressing the alterations particularly in terms of minimising the negative impact as much as possible. Time is of the essence.

5.3. Suggestions for further research work.

Future research work could be focused on potential modifying efforts undergone by the legislator or even the applicability of a potential decision of the Constitutional Court of Romania regarding this issue.

As time passes by, new potential effects which have not been taken into consideration in the early stages after the law was adopted could be the subject of further research in terms of analysing the outcome for both the defendant and the plaintiff, but also what it means for the court to obey its legal obligations stemming from the altered Civil procedural code.

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